

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE

In re: Bachovchin et al.  
Patent No.: 7,276,371  
Application No.: 10/725,952  
Filed: December 1, 2003  
For: **Stimulation of Hematopoietic Cells In Vitro**

Confirmation No. 3968  
Group Art Unit: 1631  
Examiner: Michael L. Borin

Date: March 26, 2010

Mail Stop Petition  
Commissioner for Patents  
P.O. Box 1450  
Alexandria, VA 22313-1450

**REQUEST FOR SUSPENSION OF 37 C.F.R. § 1.705(d)  
UNDER 37 C.F.R. § 1.183**

Sir:

Patentee hereby petitions under 37 CFR § 1.183 for the suspension of the rule under 37 C.F.R. § 1.705(d) that "any request for reconsideration of the patent term adjustment (PTA) indicated in the patent must be filed within two months of the date the patent issued." Patentee has concurrently submitted an Application for Reconsideration of Patent Term Adjustment under 37 C.F.R. § 1.705(d) to the Commissioner of Patents showing that the U.S. Patent Office (USPTO) miscalculated the PTA for the above referenced patent, U.S. Patent No. 7,276,371 (hereinafter "the '371 patent"). On January 7, 2010, the U.S. Court of Appeals for the Federal Circuit (CAFC) affirmed a decision of the U.S. District Court for the District of Columbia, which held that the USPTO has been incorrectly calculating PTA under 35 U.S.C. § 154(b) by awarding the applicant only the longer of either the PTA under 35 U.S.C. § 154(b)(1)(A) or that under 35 U.S.C. § 154(b)(1)(B). *Wyeth v. Kappos* (Appeal No. 2009-1120) (Fed.Cir. Jan. 7, 2010). Instead, the CAFC held that the USPTO must award PTA under both 35 U.S.C. § 154(b)(1)(A) and 35 U.S.C. § 154(b)(1)(B) except where both delays occur on the same calendar day, in which case the applicant is awarded a single day of PTA.

As shown in the Request for Reconsideration of PTA submitted concurrently in the case of the '371 patent, the PTA as determined by the USPTO includes only the 'A delay' (517 days) incurred by the PTO. However, under the *Wyeth* decision, Patentee is also entitled to the 'B delay' incurred by the USPTO of 305 days. Thus, as set forth in the Request for Reconsideration of PTA,

the total PTA should have been 822 days of PTO delay minus 50 days of Applicant delay for a total PTA of 772 days.

The '371 patent issued on October 2, 2007, which was prior to the decision in *Wyeth v. Kappos*. Prior to the issuance of the CAFC decision in *Wyeth v. Kappos*, the USPTO dismissed petitions to modify PTA based on the District Court's decision in *Wyeth* on the grounds that the District Court's decision was not controlling authority and that the CAFC had not yet ruled. Thus, until the issuance of the CAFC decision in *Wyeth*, an applicant or patentee would not have been on notice that a Request for Reconsideration of Patent Term Adjustment was necessary. The CAFC decision in *Wyeth v. Kappos* constituted a change in the law sufficient to invoke the doctrine of equitable tolling to allow for the filing of this Request for Reconsideration of Patent Term Adjustment at this time. Thus, Patentee respectfully requests the suspension of the rule under 37 C.F.R. §1.705(d) requiring that any request for reconsideration of PTA indicated in the patent must be filed within two months of the date the patent issued and that the Request for Reconsideration of Patent Term Adjustment, submitted herewith, be considered timely filed.

The Commissioner is authorized to charge Deposit Account No. 50-0220 in the amount of \$400.00. This amount is believed to be correct. However, the Commissioner is authorized to charge any deficiency or credit any overpayment to Deposit Account No. 50-0220.

Respectfully submitted,




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**CERTIFICATION OF ELECTRONIC TRANSMISSION**

I hereby certify that this correspondence is being transmitted via the Office electronic filing system in accordance with § 1.6(a)(4) to the U.S. Patent and Trademark Office on March 26, 2010.

  
Claire Wimberly